93-857

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRED A. JOSSI

Petitioner,

v.

JESSE BROWN, Secretary for Veterans Affairs;
THE DEPARTMENT OF VETERANS AFFAIRS;
THE UNITED STATES OF AMERICA, and
JANET RENO, Attorney General of the
UNITED STATES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

FRED A. JOSSI
Pro Se
4512 S.E. Monroe Street
Milwaukie, Oregon 97222
503/654-8986

67 pp

I

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals, District Court and Veterans Administration, were correct in holding that my World War II military ARMY service to the United States and resulting years as a prisoner of war of the Nazi SS, did not render a service and/or furnish any "CONSIDERATION TO THE SECRETARY [of U.S. Department of Veterans Affairs {VA}]" (an agent of the United States), which consideration, if furnished, would establish an implied-in-fact contract?

2. Whether my Honorable Discharge from the Army, present receipt of VA benefits because of injuries which I suffered during World War II while a prisoner of war of the Nazi SS, constitutes PRIMA FACIE

EVIDENCE of the "CONSIDERATION" which I furnished to the VA Secretary i.e. the agent of the United States of America?

3. Whether the absolute denial of access to justice and to meaningfully petition the Government for redress of the wrongful taking of my private money which I spent in reliance on the Government's promise/contract to conduct a hearing, violates my First Amendment right to redress grievances and my Fifth Amendment right to Due Process of Law, guaranteed to me by the United States Constitution?

4. Whether the Ninth Circuit Court of Appeals, District Court and Veterans Administration, were correct in holding that the VA "EQUITABLE RELIEF" statute [38

U.S.C. § 210(c)(2)(1989)], could not "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"?

5. Whether as a matter of SOCIAL POLICY, the lower courts were in error by failing to determine that by my military World War II service and years as a prisoner of war of the Nazi SS, that I rendered a service to the United States of America, and thereby furnished consideration to the agent of the United States of America known as the Secretary of the U.S. Department of Veterans Affairs. Can any nation long survive which fails to perceive the military service of its defenders, as a "service" and "consideration" to that nation?

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Opinions Below/Decisions To Be Reviewed:

August 16, 1993 ORDER upon Petition for Rehearing and Suggestion for Rehearing in Banc, United States Court of Appeals for the Ninth Circuit.

May 24, 1993 DECISION UPON APPEAL: United States Court of Appeals for the Ninth Circuit 92-36635.

July 15, 1992 ORDER upon written objections to the proposed findings and recommendations NO. 91-307 JE.

May 21, 1992 FINDINGS AND RECOMMENDATIONS/ORDER: United States District Court for the District of Oregon #91-307-PA.

PROVISIONS WHICH CONFER JURISDICTION:

UNITED STATES CONSTITUTION:

Article III, § 2.

First Amendment

Fifth Amendment

Federal Question: 28 U.S.C. § 1331

The Tucker Act : 28 U.S.C. § 1346

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, ETC.

CONSTITUTION:

FIRST AMENDMENT:

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for redress of just grievances."

FIFTH AMENDMENT:

"No person shall be held to answer for a capital, or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES

AUTHORITY AND DUTIES OF THE ADMINISTRATOR
38 U.S.C. § 210(a)(b)(1) (1989):
[NOW: 38 U.S.C § 303]:

APPOINTMENT AND GENERAL AUTHORITY OF ADMINISTRATOR:

"(a) The Administrator of Veterans' Affairs is the head of the Veterans' Administration. The Administrator is appointed by the President, by and with the advice and consent of the Senate"

"(b)(1) The Administrator, under the direction of the President, is responsible for the proper execution and administration of all laws administered by the Veterans' Administration and for the control, direction, and management of the Veterans' Administration."

38 U.S.C. § 210(c)(2) (1989):
[NOW: 38 U.S.C § 503]:

ADMINISTRATIVE ERROR;EQUITABLE RELIEF

"If the Administrator determines that benefits administered by the Veterans' Administration have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Administrator is authorized to provide such relief on account of such error as the Administrator determines equitable, including the payment of moneys to any person whom he determines equitably entitled thereto."

WARTIME DISABILITY COMPENSATION

38 U.S.C. § 310 (1989):
[NOW: 38 U.S.C § 1110]:

BASIC ENTITLEMENT

"For disability resulting from personal injury suffered or disease

contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct."

BOARD OF VETERANS APPEALS

38 U.S.C. § 4002(c) (1989):
[NOW: 38 U.S.C § 7102(c)]:
ASSIGNMENT OF MEMBERS OF BOARD
"A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceedings."

38 U.S.C. § 4005(a) (1989):
[NOW: 38 U.S.C § 7105(a)]:
FILING OF NOTICE OF DISAGREEMENT AND APPEAL
" . . . Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Administrator."

38 U.S.C. § 4007 (1989):
[NOW: 38 U.S.C § 7107]:

DOCKETING OF APPEALS:
"All cases received pursuant to application for review on appeal shall be considered and decided in regular order according to their places upon the docket;. . . "

REGULATIONS:

PART 3 - ADJUDICATION

ADMINISTRATIVE
38 C.F.R. § 3.103: DUE PROCESS - PROCEDURAL AND APPELLATE RIGHTS WITH REGARD TO DISABILITY AND DEATH BENEFITS AND RELATED RELIEF

"(a) Statement of policy. Proceedings before the Department of Veterans Affairs are ex parte in nature. It is the obligation of the Department of Veterans Affairs to assist a claimant in developing the facts pertinent to his or her claim and to render a decision which grants him or her every benefit that can be supported in law while protecting the interests of the Government. This principle and the other provisions of this section apply to all claims for benefits and relief and decisions thereon within the purview of this part.

"(c) Hearings. Upon request a claimant is entitled to a hearing at any time on any issue involving a claim within the purview of this part. . . "

PART 19 - BOARD OF VETERANS APPEALS

HEARINGS

"38 C.F.R. § 19.159 Rule 59: SCHEDULING AND NOTICE OF HEARING

"(a) *General*. To the extent that facilities permit, hearings **will** be scheduled at the convenience of appellants and their representatives, ***with consideration of the travel distance involved***. . . "

(b) *Notification of hearing*. When a hearing is scheduled, the person requesting it will be notified of its time and place, and of the fact that the government may not assume any expense incurred by the appellant, the representative or witnesses attending the hearing. The appellant or the representative has a period of 60 days from the date of the letter of notification in which to request a different date for the hearing. Only one request for a change of the date of the hearing will be granted during the 60-day period, and this will be stated in the letter to the appellant and/or the representative at the time a response is given in regards to scheduling a hearing. . . . **Thereafter, the date of the hearing will become *fixed and cannot be changed***, except as provided in paragraph (c) of this section. ***FAILURE*** **by the appellant or the representative *TO APPEAR* at the hearing as scheduled will result in the case being forwarded to a Section of the Board for**

continuation of the appellate process.

(c) *Extension of time.* After a hearing date has become fixed, an extension of time for appearance at a hearing may be granted for good cause shown . . . **The request for extension should be in writing and *must* *be filed with the Chief of the Hearing Section***. Ordinarily, hearings will not be postponed more than 30 days. Examples of good cause include the following: illness of the appellant and/or representative, difficulty in obtaining records, and unavailability of a witness."

(emphasis added)

"38 C.F.R. § 19.169 Rule 69: RECORDING OF HEARINGS

An appellant or representative may record the hearing with his/her own equipment. Filming, videotaping or televising the hearing may be authorized provided a consent is obtained from the appellant and made a matter of record. In all such situations advance arrangements must be made with the Chief of the Hearing Section. . . "

LEGISLATIVE MATERIALS

RE: ABOVE CITED VA "EQUITABLE RELIEF STATUTE" 38 U.S.C.§ 503 (formerly § 210(c)(2)). Senate Report No. 1727, Oct. 13, 1966 [To accompany H.R. 11631] Cong. Record Vol. 112 (1966)

"This section amends section 210 of title 38, United States Code, by adding a new

paragraph. . . The amendment . . . would authorize relief **IN ANY SITUATION** **where an administrative error has operated to deny a benefit to which a veteran is equitably entitled under the law.** . . More specifically, this section would authorize the Administrator to take **REMEDIAL** action **IN ANY CASE** where benefits or payments **UNDER ANY LAW** administered by the Veterans' Administration have been denied, or otherwise have not been provided, by reason of administrative error on the part of the Government or any of its employees. . . **This section WILL ASSURE that governmental administrative error, past or future, either through an act of OMISSION or COMMISSION, does not result in the denial of benefits provided by Congress.**"

STATEMENT OF THE CASE

I am a World War II Army veteran, who was captured in North Africa during the early stages of World War II, by General Rommel's German Afrika Korps forces. After capture, I was imprisoned for years in a Nazi SS Prisoner of War camp, where I was beaten, starved, and otherwise abused for years, until I finally escaped shortly before the end of the war.

On June 7, 1990, I was scheduled for a hearing in Washington, D.C. before the U.S. Department of Veterans Affairs (VA) Board of Veterans Appeals (BVA), as per my request and my right. The hearing was set for October 31, 1990, at 2:00 p.m. in the Riggs bank building. The government did not show for the hearing, thereby

directly causing me to waste thousands of dollars of my own money in travel, lodging, food costs, etc. The following VA laws, regulations, etc., apply to said VA hearing, and the manner in which the VA was required to conduct the matter, but failed.

Under VA statute [38 U.S.C. § 310 (1989)] concerning basic entitlement to veterans benefits, I am eligible for said VA benefits and, in fact, am "service-connected" for various war related disabilities.

Under VA statute and regulation [38 U.S.C. § 4005(a) (1989) and 38 C.F.R § 3.103] I am entitled to a hearing at any time on any issue involving my VA claim.

VA regulation [38 C.F.R § 19.159(a), BVA Rule 59] requires that Board of Veterans Appeals (BVA) hearings "will be scheduled at the

convenience of appellants . . . with consideration of the travel distance involved", which, in the instant case, is 3,000 each way.

Significantly to the instant case, VA regulation [38 C.F.R § 19.159(b), BVA Rule 59] also provides that Board of Veterans Appeals (BVA) hearings "become fixed and cannot be changed", and that failure of the veteran (what about the Government?) "to appear at the hearing as scheduled, will result in the case being forwarded to a Section of the Board for continuation of the appellate process".

VA regulation [38 C.F.R § 19.159(c), BVA Rule 59] concerning "Extension of time" requires that all requests for extensions of time "should be in writing and must be filed with the Chief of the Hearing Section", and will only be postponed

for "good cause" such as "illness of the appellant".

VA statute [38 U.S.C. § 4007 (1989)] required that BVA hearing at issue herein: "shall be considered and decided in regular order according to their places upon the docket".

VA statute [38 U.S.C. § 4002(c) (1989)] provides that the BVA "shall make determination on any proceeding instituted before the Board . . . "

VA regulation [38 C.F.R § 19.169(c), BVA Rule 69] provides that I may videotape my BVA hearing, "provided . . . advance arrangements" are made with the Chief of the Hearing Section. As per the requirements of said regulation, I had made the required arrangements to videotape my hearing.

ARGUMENT

The U.S. Department of Veterans Affairs (VA) argues that the hearing location was changed at the last minute, and admits that I was not notified, regardless of the VA's knowledge that I (and my 3 witnesses, etc.) were travelling a distance of more than 20,000 miles for said hearing.

In that regard, in response to a letter (see: Appendix "B", pages B-1 through B-4) dated November 20, 1990 from Congressman Ron Wyden to the Chairman of the VA Board of Veterans Appeals, the VA Secretary admitted by letter (see: Appendix "B" pages B-5 through B-8) dated December 27, 1990, that the "problems" were "the Board's fault" Significantly, the Secretary did not comment on why the hearing location was changed, even though the VA knew that neither I nor my

representative had been notified. In Rep. Wyden's letter, he specifically indicated:

> "I am requesting that Mr. Jossi be given an opportunity to appear before the BOVA before the end of this year. Mr. Jossi and Mr. Stanton have indicated they will travel to Washington, D.C. However, I would suggest that they should not be required to pay the travel or lodging costs, as they are not at fault for the cancellation of the October 31st hearing."

To date, I have not had another BOVA hearing. In the above cited letter from the VA Secretary, he indicated:

> "Additionally, he [Jossi] was informed that there was no legal authority under which the Board of Veterans Appeals or VA could pay for any of the expenses he or Mr. Stanton incurred as a result of his hearing [which did not take place] in Washington."

The record is clear before the lower Courts, that I asserted as relevant "legal authority", the VA EQUITABLE RELIEF statute, 38 U.S.C. § 210(c)(2) (1989), which provides, in part, as follows:

> "If the Administrator determines that benefits administered by the Veterans' Administration have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Administrator is authorized to provide such relief on account of such error as the Administrator determines equitable, including the payment of moneys to any person whom he determines equitably entitled thereto."

Significantly, the Legislative History (see: Senate Report No. 1727, Oct. 13, 1966 [To accompany H.R. 11631] Cong. Record Vol. 112 (1966)) of the statute appears, as follows:

> "This section amends section 210 of title 38, United States Code, by adding a new paragraph. . . . The amendment . . . would authorize relief **IN ANY SITUATION** **where an administrative error has operated to deny a benefit to which a veteran is equitably entitled under the law**. . . . More specifically, this section would authorize the Administrator to take **REMEDIAL** action **IN ANY CASE** where benefits or payments **UNDER ANY LAW** administered by the Veterans' Administration have been denied, or otherwise have not been provided, by reason of administrative error on the part of the Government or any of its

> employees. . . This section WILL ASSURE that governmental administrative error, past or future, either through an act of OMISSION or COMMISSION, does not result in the denial of benefits provided by Congress."

The VA and lower Courts ignored said "legal authority" to correct said governmental administrative error. "Entitlement to money damages in actions brought under the ACT depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" United States v. Testan, 424 U.S. 392, 400 (1976).

The VA and the lower Courts also failed to understand that in keeping with the above cited 38 U.S.C. § 310 (1989), 38 U.S.C. § 4005(a)(1989) and 38 C.F.R § 3.103, that my honorable military wartime service was, and is, both a "service" and "consideration" which I rendered to the Secretary,

because as under 38 U.S.C. § 210(a)(b)(1) (1989) the Secretary is an agent of the United States of America, therefore as the agent/representative of the United States of America, the Secretary did, in fact, reap both a "benefit" and a "service" from my military service. Accordingly, my Honorable Discharge and present receipt of VA benefits constitute PRIMA FACIE EVIDENCE of the "CONSIDERATION" which I furnished to the VA Secretary i.e. the agent of the United States of America.

Throughout the history of my case since the hearing did not take place during October 31, 1990, I have been absolutely frustrated by my absolute inability to cause the VA and lower courts to understand that my clear rights under the above cited VA statutes and regulations, were violated. Regardless of the mandate

of above cited 38 C.F.R § 19.159(a), BVA Rule 59, the VA appears to have totally ighored the travel distance involved, as well as any consideration of my "convenience". The VA ignored the fact that my hearing was in a "fixed and cannot be changed" status, as per 38 C.F.R § 19.159(b), BVA Rule 59, apparently believing that it could allegedly change my hearing location only minutes of seconds prior to the hearing.

The VA totally failed to articulate a "good cause" reason (or any reason at all for that matter) for changing my hearing location at the last minute, in contrast to the provisions of 38 C.F.R § 19.159(c), BVA Rule 59.

Finally, even after my hearing did not take place, and Congressman Wyden requested that I be given the

opportunity prior to the end of 1990 to have a BOVA hearing, and that I should not be require to pay the associated costs, the VA failed in its mandate under 38 U.S.C. § 4002(c) (1989)] which requires that the BVA "shall make determination on any proceeding instituted before the Board . . . " To date, 3 years later, I have still not had a BOVA hearing and a decision has not been made concerning the matters at issue therein.

Also significantly, the VA has ignored the mandate of 38 U.S.C. § 4002(c) (1989), which requires that the BVA "shall make determination on any proceeding instituted before the Board . . . "

Concerning my BVA hearing which did not take place, the VA has violated its own above said statutes and regulations with what it believes

to be total impunity, and the lower Courts have done nothing to uphold the law or my rights. My First Amendment right guaranteed by the U.S. Constitution to seek redress of grievances, as well as my Fifth Amendment right to "Due Process of Law", have been ignored, and I continue to be outraged by the resultant absolute denial of access to justice. Certainly, I should not be denied the protections of the same United States Constitution which I was injured and brutalized during World War II, defending!

Additionally, an action for damages arising out of alleged fourth and fifth amendment violations should not be dismissed for want of federal jurisdiction. Bell v. Hood, 327 U.S. 678, 684 (1946). The VA and lower Courts ignored the Marbury premise that for every right there must be a

remedy. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). Action challenging the constitutionality of the V.A.'s procedures, claiming that the agency did not provide him with a hearing before changing his disability rating, held that 38 U.S.C. §211(a) (now § 511) did not bar review of claims that the procedures of the V.A. violate the due process clause. Winslow v. Walters, 815 F.2d 1114 (7th Cir.1987). I assert that the VA's practices and procedures evidenced by this case, have violated my right to due process of law, as

well as my right to seek redress of grievances.

Something has to mean something in America. If we as a nation can not or will not ensure that America's injured defenders have the same meaningful access to justice enjoyed by those who violate the rights of Society, the seed will have been sown to unravel our national Social Policy. As I once testified before a U.S. Congressional Hearing in Washington, DC: " . . . what should I tell my grandchildren who want to enlist in the Armed Forces?"

The "service" which I rendered the "United States" and its agent: "the Secretary of the VA", are a matter of record in this case. The legal "consideration" is also apparent. Please do not permit the VA to bankrupt the patriotic "Social Policy" of America.

DATED this 15th day of November, 1993.

Respectfully submitted,

Fred A. Jossi
Pro Se
4512 S.E. Monroe Street
Milwaukie, Oregon
97222
503/654-8986